

***United States Court of Appeals
for the Second Circuit***



**SUPPLEMENTAL
APPENDIX**

77-1238

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

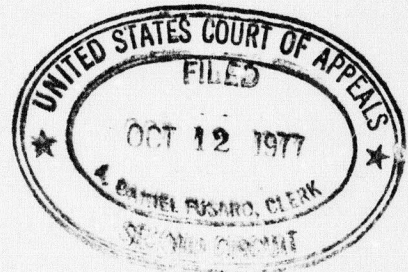
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VS.

LANI M. BROZYNA,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK.

**SUPPLEMENTAL APPENDIX FOR
DEFENDANT-APPELLANT**



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PAGINATION AS IN ORIGINAL COPY

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EXHIBIT.

Government's Exhibit:

Exhibit 13--Document. Received in evidence at page 12.

Not Printed.

Excerpts of Transcript of Proceedings.

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF NEW YORK

3 * * * * *

4 THE UNITED STATES

5 -v-

CRIMINAL DOCKET
NO. 1975-63

6 LANI M. BROZYNA,

7 Defendant.

8 * * * * *

9 Transcript of Proceedings of Motion for
10 Severance held before the HON. JOHN T. CURTIN, United States
11 District Judge on September 29, 1975 and Proceedings of Trial
12 held before the HON. JOHN T. CURTIN, United States District
13 Judge, and a Jury, in Part I, United States Court House,
14 Buffalo, New York, commencing on August 3, 1976.

15
16 APPEARANCES: RICHARD J. ARCARA, United States Attorney,
17 by KENNETH A. COHEN, Assistant United States
18 Attorney, and EDWARD J. WAGNER, Assistant
United States Attorney.

19 EDWARD HELLER, Esq., Attorney for the
20 defendant.

21
22
23 * * *

Motions.

1 and I agree that the jury verdict is
2 absolutely conclusive, it settles the
3 matter and the case is very short,
4 certainly will be over tomorrow. The
5 jury has been picked and they are here.
6 I don't see any practical reason.

7 THE COURT:

We will have to wait until 1:30.
8 On the other motion?

9 MR. HELLER:

As to the other matter, your Honor,
10 I move to dismiss the first count of the
11 indictment on the ground that it is
12 apparent from the testimony of both Mr.
13 Cali and Miss Veres that no acquisition
14 of this firearm occurred. The indictment
15 charges only in terms of the acquisition.

16 THE COURT:

It says - -

17 MR. HELLER:

A firearm.

18 THE COURT:

It says, or in connection with the
19 acquisition.

20 MR. HELLER:

Yes, sir. The statute upon which
21 the Government relies, 922(a)(6) makes
22 it a violation to do certain acts in
23 connection with the acquisition or
24 attempted acquisition of a firearm and
25 this is an attempt and not an acquisition

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WESTERN DISTRICT OF NEW YORK

Motions.

1 and for that reason, I would ask that
2 the Court dismiss the first count of the
3 indictment.

4 THE COURT: I will defer ruling, Mr. Wagner, to
5 give you an opportunity to look at some
6 authority and then, perhaps, we can take
7 it up.

8 MR. WAGNER: Fine.

9 THE COURT: Preferably when we return and if
10 we cannot do it then, we will do it as
11 soon as we can.

12 MR. WAGNER: Fine, Judge. Thank you.

13 THE COURT: We will be in recess.

14
15 (Recess taken at 12:38 p.m.)
16
17

18 * * * * *

Motions.

Tape 6

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25**PROCEEDINGS:**

August 18, 1976, 2:30 p.m.

APPEARANCES:

As before noted.

(Defendant present.)

(Jury not present.)

THE COURT:

Mr. Wagner, Mr. Heller, before the jury comes, is there anything to be done now? Have you had a chance to research that problem or have one of your associates do it?

MR. WAGNER:

I have some of the most worthiest and competent associates, Buffalo Law Students do the work and who are a lot better than we are in doing all the work and they tell me and I want to tell you we take this approach, Judge; first of all, we argue that the indictment could be amended without any problems, we feel, to change the language from "acquisition" to "attempted acquisition" to resolve any discrepancy at all between the facts of the case as we all know them and as they will come out and the language of the statute as it is set forth in the indictment. The statute does talk about

Motions.

1 acquisition or attempted acquisition
2 and I think the first approach we would
3 make in the first request would be to
4 amend the indictment to so do that. Now,
5 the cases that these bright young people
6 found in the short time we had,
7 recognized that Rule 7 does talk about
8 the fact that informations can be amended
9 but the Second Circuit has recognized
10 that the practice has developed over the
11 years and I will cite, your Honor,
12 United States vs. Cirami, 510 F.2d 69.
13 That is a Second Circuit case. That is
14 a 1975 case and it discusses the fact
15 that under circumstances indictments can
16 be amended and it seems to imply in the
17 other cases it cites and other cases in
18 support of it, seem to imply that indict-
19 ments can be amended without resubmission
20 to a grand jury where it is essentially
21 a form rather than a substance and I
22 submit that that is what we have here,
23 Judge.

24 THE COURT:

Of course, there is a great difference
25 between acquiring a weapon and attempting

3

Motions.

1 to acquire a weapon.

2 MR. WAGNER:

I think, first of all, I think
3 there may be. I think the language of
4 the statute reads in the acquisition.

5 THE COURT:

Connection with the acquisition.

6 MR. WAGNER:

I think that is a process, not a
7 specific act and I would argue alterna-
8 tively, Judge, that if the Court chose
9 not to amend the indictment to read,
10 "attempted acquisition", which I would
11 urge first, if the Court chose not to,
12 the indictment, as it stands, is sufficient
13 to charge a crime.

14 THE COURT:

As far as it may make a difference
15 whether or not the defendant knew for
16 some time what the Government's evidence
17 has been.

18 MR. WAGNER:

Yes. Of course, he had the indict-
19 ment, your Honor, and he had the statute
20 which is set forth in the indictment,
21 Section 922(a)(6) and the penalty section,
22 Section 924(a), and on June 26, 1975,
23 over a year ago, Mr. Cohen sent Mr. , -
24 well, filed an affidavit with the court ,
25 a copy to Mr. Heller explaining that he

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1 had advised to him during an oral
2 conversation that the defendant had not
3 completed purchasing the firearm referred
4 to in Count 1, so Mr. Heller can not
5 argue at this time, surprise, prejudice,
6 inability to now come in to court and
7 defend the count. He can not argue that
8 there is confusion as to his jeopardy
9 here if there is a later trial and we
10 are bound by the facts and I think with-
11 out question, if the indictment, as it
12 stands now, went to the jury, and she
13 was convicted, we could not later charge
14 her with attempted acquisition. Clearly
15 jeopardy would attach.

THE COURT:

Or if she was acquitted.

MR. WAGNER:

Or if she was acquitted, and clearly,
this charge applies to these acts and
Mr. Heller has known that for over a year.

THE COURT:

In addition to Mr. Cohen's letter,
was there anything in your Bill of
Particulars?

MR. WAGNER:

A Bill of Particulars was never
asked for. I made available to Mr. Heller
as soon as I came into the case every

Motions.

physical exhibit we had.

1
2 THE COURT:

Did Mrs. Brozyna make a statement here?

3
4 MR. WAGNER:

Well, she admitted having gone into the store when she was arrested and trying to buy the gun and said, "I never got out with it", yes, she did admit to that.

5
6
7
8
9 THE COURT:

I see.

10 MR. WAGNER:

She said, "Why are they making such a big deal".

11
12 THE COURT:

Did Mr. Heller have the names of witnesses available?

13
14 MR. WAGNER:

Of course, they were read to him at the day of voir dire and I gave him an oral accounting of them since we trimmed them but I didn't include anybody that had been on the list.

15
16
17
18 THE COURT:

What did he say about that?

19 MR. WAGNER:

He saw the ones with respect to acquisition this morning. They have been available to him. I offered to let him look at every exhibit I had and all the documents I had.

20
21
22
23
24 THE COURT:

Mr. Heller.

25

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WESTERN DISTRICT OF NEW YORK

Motions.

1 MR. HELLER:

If the Court please, Mr. Wagner is very quick to point out that I have known by virtue of Mr. Cohen's statement which I received, since June 26, 1975, that this purchase was not completed. I have no control over whether the U.S. Attorney wishes to amend an indictment, move to amend an indictment or resubmit an indictment. They have known since the very beginning that this was not an acquisition as defined in the case law of the Supreme Court in the case of Huddleston which I mentioned to Mr. Wagner before.

15 THE COURT:

What is it, Huddleston?

16 MR. HELLER:

Huddleston, your Honor, Huddleston vs. U. S., 94 Supreme Court 1262.

18 THE COURT:

Do you have some other citation?

19 MR. HELLER:

I don't have the U.S. citation.

20 THE COURT:

Do you have the Lawyer's Ed.?

21 MR. HELLER:

Yes, 39 Law Ed., 782.

22 THE COURT:

Wait a minute, just 39 Lawyer's Edition?

24 MR. HELLER:

Second, your Honor.

25 THE COURT:

Oh, second, 732?

Motions.

782.

7

1 MR. HELLER:

2 MR. WAGNER:

Your Honor, I have the U.S. Cite.

3

It is Volume 415, Page 814, U.S. Reports.

4

THE COURT:

All right.

5

MR. HELLER:

I am reading from the head note,
your Honor. It says, "The word 'acqui-
sition' is not ambiguous but clearly
includes any person who comes into
possession, control or power or disposal
of a firearm".

10

11

THE COURT:

Let me do this; let me read the
case, Mr. Heller, and then we can maybe
talk about it with more sense. Any
other cases that either one of you want
me to read?

15

16

MR. WAGNER:

Your Honor, I cite you two, -
perhaps not the most persuasive authority
but I think very good, a well written
opinion, United States vs. Owens, O-w-e-n-s.
It is from a District Court in Minnesota
and the citation is 334 F.Sup. at Page
1030. I also have, Judge, a case, another
Second Circuit case which again speaks
on the same theory that we are arguing.
It is United States vs., - I will spell

22

23

24

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Motions.

the last name, C-o-l-a-s-u-r-d-o, and
that's at 453F.2d, Page 585.

THE COURT: 585, all right.

MR. WAGNER: Again, that speaks about the fact
that indictments can be amended where
the factors are such as not to cause
prejudice, not to really change what
the defendant has to defend. I would
also, Judge, with respect to the
Huddleston case - -

THE COURT: Let me read the cases, Mr. Wagner,
and then I will hear your discussion.
Do you have any other cases you want me
to look at, Mr. Heller?

MR. HELLER: No, sir.

THE COURT: All right. Why don't we have the
jury come up. We have to have the
opening statements, right?

MR. WAGNER: Right.

THE COURT: Let us have the jury come up and
we will have openings. I will defer
ruling on your motion so that as far as
extensive discussion before the jury
about what the indictment charges, do
you believe that you must do that now?

* * *

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WESTERN DISTRICT OF NEW YORK

Motions.

(Government Exhibit Number 13
received in evidence.)

MR. WAGNER:

That is the last one, your Honor.

THE COURT:

Mr. Heller, you have some motions?

MR. HELLER:

Yes, sir. Your Honor, I would
renew my motion for a dismissal of the
indictment on the ground that it charges
Lani Brozyna with doing certain acts
in connection with the acquisition of
a firearm and that the Huddleston case
makes it clear that acquisition implies
possession, conclusion of the transac-
tion, whereas we are, in fact, dealing
here with an attempted acquisition and
that there is a substantive difference
between an acquisition and an attempted
acquisition which makes the proof as
submitted defective.

THE COURT:

Mr. Heller, - or Mr. Wagner, what
is the Government's position now?
Are we going to stand by the indictment
as written, or do you move to amend?

MR. WAGNER:

Your Honor, I would argue alterna-
tively. First of all, I would move in

Motions.

1 the first course to amend the indictment.
2 I would argue that the case as set forth,
3 that an amendment which relates to the
4 form of the indictment is permissible
5 and the question is, - the question of
6 the word "form" doesn't mean much, but
7 the essence of that argument is whether
8 or not the defendant is apprised of the
9 charges, can defend himself in any
10 subsequent prosecution, has had a chance
11 to defend the case, whether it would
12 require surprise to him and that is not
13 the case here because of the fact that
14 he has had notice for over a year,
15 specifically of the actual absolute
16 theory the Government has been proceeding
17 on, and in the alternative, I would argue
18 that if the Court did not permit the
19 indictment to be amended, that the
20 indictment does read "In connection with
21 the acquisition", and that the facts
22 here are facts relating to the action
23 of an acquisition. It was not
24 consummated, perhaps, and at the very
25 final point, we would argue that

Motions.

1 acquisition is a process, not a
2 specific instance.

3 THE COURT:

Of course, the section does talk
4 about attempt or in connection with the
5 acquisition, is that it?

6 MR. WAGNER:

It says in connection with the
7 acquisition or attempted acquisition.

8 MR. HELLER:

Your Honor, may I say something in
9 addition to what I previously have
10 stated about this motion, this particular
11 aspect of my motion. Mr. Wagner has
12 repeatedly stated I have been on notice
13 of the fact this transaction was not
14 consummated. That is true and so is the
15 U. S. Attorney's office. Now, we have
16 proceeded to trial and Miss Brozyna was
17 advised by the United States Attorney's
18 office that if she refused to take their
19 offer of a plea to one count of the
20 indictment, that it would be withdrawn.
21 The indictment we were talking about
22 was this indictment, so that it has
23 prejudiced Lani Brozyna to have to go
24 to trial here and it does work a hard-
25 ship upon the defense to, at this stage

Motions.

1 of the proceedings, allow the prosecution
2 to amend this indictment to change it,
3 not to delete surplusage, but to change
4 the substantive content of the indictment.
5 Now, I read the cases that Mr. Wagner
6 cited to the Court and it seems to me,
7 your Honor, that the situation in those
8 cases, with respect to the deletion of
9 language from the indictment is substan-
10 tially different from what is presented
11 to the Court here. There is nothing to
12 delete here. We are talking about a
13 real change in this indictment.

14 THE COURT:

Mr. Wagner, I asked you yesterday,
15 or a few days ago, in the rules under
16 (e) or (f) it clearly gives permission
17 to amend an information, but says nothing
18 about indictment in the rules.

19 MR. WAGNER:

I recognize that, your Honor.

20 THE COURT:

Have you found in your research
21 why that is so?

22 MR. WAGNER:

Well, I don't know why it is so,
23 Judge, but I know that the case of
24 United States vs. Cirami, 510 F.2d, 69,
25 the Second Circuit recognizes that and

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1 characterizes it as a rule that has
2 been amended over the traditional
3 course of the case decisions that have
4 come down and it recognizes that
5 indictments can be amended notwithstand-
6 ing the literal reading of Rule 7 and
7 I would submit that if we had to decide
8 here, that is a 1975 Second Circuit case.

9 THE COURT:

When you think of how you are
10 supposed to try to understand what
11 statutes mean, Rule 7 talks about
12 indictment and information saying how
13 they are to be filed, the nature of
14 their contents and then when it gets
15 to, - and it talks about both, but when
16 it gets to amendment, it only refers
17 to information. I will look at the
18 case again and I will simply reserve
19 ruling on this motion for the present
20 until I have had a chance to look at
21 it.

22 MR. HELLER:

I would further move, your Honor,
23 for dismissal on the ground, - if your
24 Honor wants me to continue with this.

25 THE COURT:

Yes.

Motions.

1 MR. HELLER:

2 On the grounds that the proof
3 offered by the Government with respect
4 to 18, 921 Sub(a)(4)(b) is deficient
5 and defective as a matter of law on the
6 question of whether or not the Secretary
7 of the Treasury has promulgated or has
8 failed to promulgate any determinations
9 or findings as he is given the authority
10 to do by that provision. It seems to me
11 that the only way that that could be
12 properly established is to refer to a
13 manual and I am confident that one
14 exists of all the Secretary of the
15 Treasury's findings as he is required
16 or given authority to make from time
17 to time. Now, it seems to me that all
18 we have here is a phone call to a Mr.
19 Scroggie who says he is not aware of any,
20 or says that there aren't any. I don't
21 think that is enough and I don't think
22 the jury should be allowed to decide
23 that that is enough, especially in view
24 of the inside out, for want of a better
25 expression, nature of this statute
where one point we talk about firearms

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Motions.

1 and the next point talks about destruc-
2 tive devices and included in destructive
3 devices, we talk about shotguns. I
4 think that that is all impermissibly
5 vague and not the kind of a statute
6 which a jury should be allowed to pass
7 on in a criminal case. This statute
8 has civil sanctions as well, licensing
9 sections. It may be good enough language
10 for those kind of sanctions, but not for
11 criminal sanctions and last, I would
12 urge your Honor that the types of
13 representations which would constitute
14 an indictable offense, - where is that
15 4473 in Government's Exhibit Number 1, -
16 are those representations made on the
17 top half of the form which the declarant
18 is asked to sign under penalty of
19 perjury and there has been no proof
20 here that Lani Brozyna, even though she
21 did not represent herself to be Lani
22 Brozyna, answered as to her untruthfully
23 any of those questions, and as to Count
24 1 of the indictment, those are all the
25 motions I have. As to Count 2 - -

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Motions.

1 THE COURT: Do you have that form there for a
2 minute, Mr. Wagner?
3 MR. WAGNER: The 4473 Form, your Honor?
4 THE COURT: Yes. Very well. On Count 1, except
5 as to the part that I reserved on, I
6 will deny your motion.
7 MR. HELLER: With respect to Count 2 of the
8 indictment, your Honor, I urge the Court
9 to dismiss on the ground that the
10 Government has failed to meet its
11 burden of proof that the defendant's
12 non-appearance was willful. All that
13 has been presented to the jury is that
14 she did not appear on November 8th or
15 15th and there is nothing presently
16 before the jury that would entitle them
17 to come to the conclusion, beyond a
18 reasonable doubt, that it was a willful
19 non-appearance.
20 THE COURT: What about that?
21 MR. WAGNER: Your Honor, I disagree with Mr.
22 Heller. First of all, we have the fact
23 that notices were sent to her at the
24 address she gave on the bond and were
25 returned with a notation that she had

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Motions.

1 left, moved, left, no forwarding address,
2 and the law is clear that a person who
3 deliberately thwarts the receipt of
4 notices cannot, thereby, allege their
5 non-appearance was non-willful, and in
6 addition, we have the statement given
7 Mr. Moyer, she knew she was to appear
8 in court and just didn't think that it
9 was such a big deal and moved to
10 California with her husband and if the
11 jury can't find, from that evidence
12 that she willfully did it, - well, I am
13 sure they could.

THE COURT:

14 I will deny your motion on that,
15 Mr. Heller. I want to step off for a
16 minute and think about whether to grant
17 the motion to amend or whether or not,
18 as pleaded, it meets the standard. I
19 will be back in a few minutes.

20 (Recess taken at 2:52 p.m.)
21

22 * * * * *
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Motions.

1 PROCEEDINGS: After recess, 3:05 p.m.

2 APPEARANCES: As before noted.

3 (Defendant present.)

4 (Jury not present.)

5

6 THE COURT:

Mr. Wagner, I have thought about
your motion and I have done a little
reading on it and after some thought it
seems to me clear that under the
circumstances you may not amend the
indictment at this time. There is a
very significant difference between an
information and an indictment. An
information is filed by the United States
Attorney. It is prepared by the United
States Attorney and under the law because
of the fact that it is for relatively
minor offenses, the decision to go ahead
with the criminal prosecution is left
by the Congress and by the Constitution
of the United States to the United States
Attorney. An indictment is an entirely
different thing. We fall into maybe
sloppy practices because we know that as
a matter of practicality that the

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Motions.

1 indictment is prepared by the United
2 States Attorney's office but officially
3 and as a matter of law it is a product
4 of the work of the grand jury and if
5 there is going to be any changing of an
6 indictment, amending of an indictment in
7 a substantive way, it can only be done
8 by a grand jury. It is true that there
9 have been cases where if it is a change,
10 amendment as to form only, clearly
11 something which is a typographical error,
12 spelling, a reference to matters which
13 are clearly, everyone can recognize are
14 mistakes, that may be, those kind of
15 things may be amended. Briefly in Moore's
16 Federal Practice at Page 7-24 discussing
17 Rule 7 of the Federal Rules of Criminal
18 Procedure, the subsection dealing with
19 amendments, the text says very briefly
20 that Rule 7 expressly provides for
21 amendment of an information but not of
22 an indictment. It is clear that the
23 latter like the former may be amended as
24 to matters of form, such as a correction
25 of typographical errors. However, where

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1 the offense may be prosecuted by either
2 indictment or information, - this offense
3 may be prosecuted only by indictment and
4 if it is an instance where you are
5 discussing waiver of indictment and
6 proceeding by information, we just do not
7 have that before us, so we are talking
8 about indictment. The Government having
9 elected to proceed by indictment is bound
10 by all the rules governing grand jury
11 proceedings and indictments and there
12 the footnote referred to is United States
13 against Fischetti decided in the Fifth
14 Circuit, 1971, 450 F.2d, 34. Whether a
15 particular change affects form or
16 substance must be left to judicial
17 interpretation. It appears to me clear
18 that the language, that there is a
19 difference between an attempt and the
20 connection with the acquisition so that
21 I deny your motion to amend the indictment.

22 As to the second part of this,
23 whether the facts which we have heard
24 in this case constitute an offense
25 under the indictment as charged, I must

* * *

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Motions.

1 be frank to say that I am troubled. I
2 think that there may be argument.
3 Certainly if the statute had read simply
4 in connection with the acquisition or the
5 purchase of a firearm, then you, Mr.
6 Wagner, I think would have a very, very
7 firm and excellent argument, but Congress,
8 they put in there "in connection with the
9 acquisition" and so forth and so on, plus
10 the attempted acquisition of, so in the
11 mind of the Congress, there must have
12 been a difference between the two types
13 of events. Because I believe you do have
14 an argument, however, what I will do for
15 the present is reserve decision on
16 defense motion.

17 Mr. Heller, you have some evidence?

18 MR. HELLER:

Yes, your Honor.

19 THE COURT:

All right. Would you have the jury
20 come up, Mr. White.

21 MR. WAGNER:

Your Honor, I don't know what Mr.
22 Heller intends to call, who he intends
23 to call, but if he intends to put the
24 defendant on, there is a question about
25 use of prior convictions to cross examine

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AFFIDAVIT OF SERVICE BY MAIL

RE: U.S.A. vs Lani M. Brozyna

State of New York)
County of Genesee) ss.:
City of Batavia)

No. 77-1238

I, Leslie R. Johnson being
duly sworn, say: I am over eighteen years of age
and an employee of the Batavia Times Publishing
Company, Batavia, New York.

On the 23rd day of September, 19 77
I mailed copies of a printed Supp. Appendix
the above case, in a sealed, postpaid wrapper, to:

10 copies (by Air Mail) to: A. Daniel Fusaro, Clerk
United States Court of Appeals, Second Circuit
New Federal Court House
Foley Square
New York City, New York 10007

2 copies to: Richard J. Arcara, U.S. Attorney
Att: Edward J. Wagner, Assistant U.S. Attorney
502 U.S. Courthouse
Buffalo, New York 14202

at the First Class Post Office in Batavia, New
York. The package was mailed Special Delivery at
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McDonough, Beasberg, Hamsher, Heller & Ramm, Att: Edward Heller, Esq.

930 Walbridge Building, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this

23rd day of September, 19 77

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1978